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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 349

WORZ, INC., PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION AND MID-FLORIDA TELEVISION CORP.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (Pet. App. 1a) has not been reported. The decision of the Federal Communications Commission is reported at 22 F.C.C. 1254.

JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 1958 (Pet. App. 2a). A petition for rehearing *en banc* was denied on June 10, 1958 (Pet. App. 3a). The petition for certiorari was filed on September 8, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below, in sustaining the validity of the Commission's findings, met the requirements of the Administrative Procedure Act concerning review of the record.

2. Whether the Commission had prejudged an issue in the proceeding, thereby depriving petitioner of a hearing before a fair and impartial tribunal.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Pertinent provisions of the Fifth Amendment and of Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 1009(e), are set forth at page 3 of the petition.

STATEMENT

WORZ, Inc. (petitioner), and Mid-Florida Television Corp. (intervenor in the court below) submitted applications for construction permits, both proposing to operate on Channel 9 in Orlando, Florida. The applications, being mutually exclusive, were designated for comparative hearing to determine which applicant would better serve the public interest as a television station licensee. See *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327. After a lengthy evidentiary hearing, an examiner's initial decision, the filing of exceptions thereto and supporting briefs, and oral argument before the Commission, it rendered a unanimous decision in favor of Mid-Florida. The principal bases for the decision were the superior broadcast experience of Mid-Florida and the finding that stockholders of WORZ had deliberately attempted to conceal material facts concerning the ownership and operation of the proposed television station and an existing radio station which they controlled.

On appeal, WORZ contested the Commission's determination on some nine grounds, including the Com-

mission's alleged disregard of the record in making findings adverse to WORZ and its alleged prejudgment of the issue of misrepresentations by WORZ. In a short *per curiam* decision, citing *Tampa Times Co.* v. *Federal Communications Commission*, 230 F. 2d 224, the court below unanimously affirmed the Commission's order.

ARGUMENT

1. Petitioner contends that the court below failed to consider the whole record when it determined that the Commission's findings of misrepresentation on the part of WORZ rested on substantial evidence. The standard governing judicial review of administrative findings is well settled (*Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498), and this Court will intervene in this area only "when the standard appears to have been misapprehended or grossly misapplied" (*Universal Camera, supra,* at 491). Petitioner made no showing that the court below failed to review the entire record pertinent to the contested Commission findings, but seems to suggest (Pet. 11) that, because the court did not set aside these findings, it "obviously failed" to perform its statutory review function.

The Commission was unanimous in the findings which it made, and the court below was unanimous in concluding that the findings had adequate evidentiary support considering the entire pertinent record. Congress has placed in the courts of appeals responsibility for determining whether the findings of federal administrative agencies, such as the Commission, are supported by substantial evidence, and this Court will not ordinarily interfere with the conclusion

reached on this issue. *Federal Trade Commission* v. *Standard Oil Co.*, 335 U.S. 396, 400-401.

2. Petitioner, relying on part of one sentence in the Commission's 95-page decision (Pet. 13, R. 302), contends that the Commission prejudged one of the issues in the case and thus denied petitioner a fair hearing. On this question, the court below also constitutes the appropriate review forum, and the court's rejection of petitioner's contention raises no question warranting review by this Court. Moreover, the claim of prejudgment, since it had not been raised before the Commission, was not properly made a ground for appeal. Communications Act of 1934, Sec. 405, 47 U. S. C. 405; *United States* v. *Tucker Truck Lines*, 344 U.S. 33.

CONCLUSION

The decision below is correct, and no issue calling for review by this Court is presented. The petition for writ of certiorari should therefore be denied.

We believe it appropriate, however, to invite the Court's attention to certain testimony given before the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce on June 2, 1958, subsequent to the decision by the court below affirming the Commission's order. This testimony (which may be found in the Transcript of Hearings Before the House of Representatives Subcommittee on Legislative Oversight, Volume 11, June 2, 1958, at pp. 957-965) indicates that, while the case was pending before the Commission, an *ex parte* presentation regarding the qualifications of WORZ was made to a member of the Commission by a resident of Orlando. In 1955 this individual represented Mid-

Florida, the successful applicant, in a Florida legal matter while the organization's regular counsel was indisposed. In a letter to the Subcommittee on Legislative Oversight, he stated that he was not associated with either applicant at the time the *ex parte* contact was made and that he had acted on his own initiative "as an interested citizen of this community."

The Commission has instituted an inquiry into the matter pursuant to Section 403 of the Communications Act of 1934, as amended, 47 U.S.C. 403, and will make public the results of its investigation. Since the matter was not presented to the court below and is not presented by the petition, the Commission does not and would not regard denial of certiorari as foreclosing whatever future action this inquiry may show to be appropriate.

Respectfully submitted,

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